IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of CAROLYN T. READ, Respondent, and CURT M. READ, Appellant.	No. 37964-3-II UNPUBLISHED OPINION

Bridgewater, J. — Curt M. Read appeals a dissolution decree. We affirm and award Carolyn Read attorney fees for this frivolous appeal.

FACTS

Curt and Carolyn Read were married for about 25 years and had three children.[1] Both Curt and Carolyn were successful in their careers and they accumulated approximately 2.5 million dollars in assets before seeking dissolution. Their dissolution proceeded to trial, but Curt's

[1] We refer to Curt and Carolyn Read by their first names to avoid confusion. We intend no disrespect.

attorney withdrew and Curt continued pro se.

More than one month after his attorney withdrew, Curt filed a motion for a continuance, arguing that he needed more time for discovery. The trial court denied the continuance. Curt contends that the denial was improper, and he complains about the division of property.

ANALYSIS

I. Procedural Matters

Curt assigns error to the trial court for disposing property before considering "all the relevant factors."[2] Br. of Appellant at 21-22. But he has failed to assign error to the trial court's findings of fact or conclusions of law. Unchallenged findings of fact are verities on appeal, *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994), and we limit review to determining whether the findings of fact support the conclusions of law. *State v. Rodgers*, 146 Wn.2d 55, 61, 43 P.3d 1 (2002).

---

[2] Curt also assigns error to the trial court for failing "to distinguish Appellant's evidence from their arguments at each stage of the trial" and for terminating "testimony before both parties had 'rested.'" Br. of Appellant at 15, 18-21. His arguments are misguided.

We note that the trial court has sound discretion over all matters that relate to the orderly conduct of a trial and that are not otherwise regulated by statute or a rule. *Talley v. Fournier*, 3 Wn. App. 808, 819, 479 P.2d 96 (1970). The trial court also has discretion in admitting relevant evidence. ER 402; ER 403. A trial court may exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by *considerations of undue delay, waste of time, or needless presentation of cumulative evidence*." ER 403 (emphasis added).

Here, we cannot say that the trial court erred in regulating the trial proceedings, regardless of Curt's contentions, when both parties had an opportunity to present their proposed asset division, which they did. Further, we hold that there was no error in the trial court reminding the parties of schedule constraints and ruling that Curt cease a line of questioning. The court did not exceed its discretion in ruling that needlessly presenting cumulative evidence would waste time, disrupt the trial schedule, and hinder justice. The trial court did not err.

Here, the findings of fact support the conclusions of law. The trial court characterized Curt and Carolyn's community and separate property as well as their community and separate liabilities. The court divided and awarded Curt and Carolyn their respective separate property; Curt received approximately 49.7 percent[3] of the total value of the listed assets. And the court assigned the $41,000 line of credit, the only community liability, to Curt. The conclusions of law stipulated that the "distribution of property and liabilities as set forth in the decree is fair and equitable." CP at 192. We hold that a spread in asset distribution of three-tenths of a percent supports the conclusion that the trial court made a fair and equitable distribution. Other alleged errors Curt raised are irrelevant because he did not challenge the findings or conclusions. We briefly address them to reveal how inadequate and meritless they are.

Curt also argues, without assigning any error, that the trial court improperly adopted Carolyn's pretrial information form as a basis for its division of the property because the form was not entered as an exhibit but was used as evidence. His argument is unfounded.

Generally, we will only review claimed error that is included in an assignment of error. *See* RAP 10.3(a)(4). Curt failed to assign "[a] separate concise statement" of error to his contention that the trial court improperly used the pretrial information form. RAP 10.3(a)(4). Although we construe the rules of appellate procedure liberally to promote justice and facilitate the decision of cases on the merits, RAP 1.2(a), the nature of the issue is unclear and he does not supply sufficient citations to authority. We decline to consider the issue while noting that the

[3] We performed this calculation from available material; it was neither agreed to nor calculated by the parties.

pretrial information form is a pleading under oath and used precisely to assist the court.[4]

II. Properly Denied the Continuance

Curt argues that the trial court abused its discretion in denying his motion for a continuance because he needed time for additional discovery and "to learn the process." Br. of Appellant at 12-14.

"In both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). We review a trial court's decision to grant or deny a motion for continuance for abuse of discretion. *Downing*, 151 Wn.2d at 272. We will not disturb a trial court's decision unless the appellant clearly shows that its decision is manifestly unreasonable or is based on untenable grounds or is done for untenable reasons. *Downing*, 151 Wn.2d at 272 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

In exercising discretion to grant or deny a continuance, trial courts may consider the necessity of reasonably prompt disposition of litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior

[4] Even if we were to consider the issue, his argument lacks merit. In Pierce County, parties to a contested dissolution "shall file and serve on the opposing party a pretrial information form approved by the Court." Pierce County Local Special Proceedings Rules (PCLSPR) 94.04(b). The form must be verified under oath. PCLSPR 94.04(b). The purpose of these forms is to streamline the dissolution proceeding; it is to provide the trial court with a template of each party's rendition of their proposed division of assets. With both party's pretrial information forms juxtaposed, the trial judge is able to easily compare the assets and quickly determine the disputes. The form is required, and trial courts are within the bounds of discretion to use them as a guide for following testimony on the disputed assets and amounts. Thus, so long as the parties testify regarding the information on the forms, the trial court does improperly rely on them as evidence in rendering its decision.

continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing on the trial court's exercise of discretion. *Balandzich v. Demeroto*, 10 Wn. App. 718, 720, 519 P.2d 994, *review denied*, 84 Wn.2d 1001 (1974); *accord Downing*, 151 Wn.2d at 273 (courts may consider surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure).

Although a trial court has discretion to grant or deny a motion for continuance, the motion must nonetheless comply with the applicable rules. *Makoviney v. Svinth*, 21 Wn. App. 16, 28, 584 P.2d 948 (1978) (citing *N. State Constr. Co. v. Banchero*, 63 Wn.2d 245, 247-48, 386 P.2d 625 (1963)), *review denied*, 91 Wn.2d 1010 (1979). Superior Court Civil Rule (CR) 40(e) provides in part:

> A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and address of the witness or witnesses. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain; and if the adverse party admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. The court, upon its allowance of the motion, may impose terms or conditions upon the moving party.

Even before CR 40(e), however, courts declined to grant a motion for continuance if the movant failed to show materiality of the evidence sought.[5] For example, in *Avenetti v. Brown*, 158 Wash. 517, 291 P. 469 (1930), the appellant sought to depose a witness suspected to have information that would contradict a respondent's witness. The trial court considered the materiality of evidence expected to be obtained and denied appellant's motion for a continuance. *Avenetti*, 158

[5] The Superior Court Civil Rules were originally effective July 1, 1967.

Wash. at 522. Our Supreme Court held that the trial court did not abuse its discretion in denying the motion because the appellant had not exercised due diligence in ascertaining the nature of the witness's testimony: the appellant had not shown that deposing the witness would yield material, favorable evidence. *Avenetti*, 158 Wash. at 522; *see also Gillett v. Lydon*, 40 Wn.2d 915, 918, 246 P.2d 1104 (1952) (holding that the trial court properly denied a motion for continuance when movant failed to file a statutorily required affidavit in support of his motion).

In this case, Curt submitted a written motion for a continuance but failed to explain, in an affidavit, how the evidence that he expected to obtain was material. Instead, Curt requested the continuance merely because "[t]ime is needed to properly obtain discovery," and "[o]pposing [c]ounsil [sic] has been slow to respond to [my] request for information and an extension of time will allow [opposing counsel] more time to respond." CP at 137. Pro se litigants are bound to the same rules of procedure and substantive law as attorneys. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App 405, 411, 936 P.2d 1175 (1997). Because Curt failed to explain, in affidavit, the materiality of the evidence that he expected, let alone whether he had used due diligence to procure that evidence, Curt's motion is procedurally deficient. *E.g.*, *Makoviney*, 21 Wn. App. at 29 (holding that an oral offer of proof without the required affidavit is procedurally deficient under CR 40(e)).

But even if this court excuses Curt's procedural deficiency, the trial court nevertheless acted within the proper limits of its discretion. *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 727 P.2d 687 (1986), is instructive.

In *Willapa*, the trial court permitted Willapa's counsel to withdraw approximately one

month before trial and denied Willapa's motion for a continuance. *Willapa*, 45 Wn. App. at 782. In deciding whether to grant or deny the continuance, the trial court noted a prior continuance, the prejudicial impact of delaying a party prepared for trial, and the advantages of avoiding delay in litigation. *Willapa*, 45 Wn. App at 786. The trial court also discussed the heavy trial load and why parties should not be permitted to control the trial calendar through delayed employment of substitute counsel. *Willapa*, 45 Wn. App at 786. Further, the trial court noted that Willapa's president and sole shareholder, Neil Wheeldon, who appeared pro se at trial, knew approximately two months before the scheduled trial date that Willapa's counsel had decided to withdraw. *Willapa*, 45 Wn. App at 781, 785. Division One of this court held that the trial court did not abuse its discretion because the trial court "considered all relevant aspects of the matter." *Willapa*, 45 Wn. App at 786.

Here, the trial court first gave Curt an opportunity to explain why he did not complete the discovery earlier. Curt explained that problems with his previous attorneys led to, in his view, inadequate discovery. The trial court asked for the details of the discovery sought, which Curt claimed was information regarding community assets, assets that he only vaguely described even when the trial court asked for more information. The one asset that he did specifically mention, a house that Carolyn bought, was not material because Carolyn had disclosed the funds that she used to purchase the house. And, like in *Willapa*, in which the trial court condemned delaying justice, the trial court in this case noted that it could not delay justice for Carolyn due to Curt's failure to diligently seek evidence before the trial date. After asking how much time Curt would need, the trial court denied the motion for a continuance, explaining that Curt had not shown that

the additional discovery would be material. Thus, the trial court considered the relevant issues and reasonably concluded that the continuance was unnecessary because reopening discovery would not produce any new evidence. The trial court did not abuse its discretion in denying the continuance.

III. Attorney Fees

Carolyn requests an award of attorney fees and costs for defending against a frivolous appeal. Under RAP 18.1(a), a party on appeal is entitled to attorney fees if a statute authorizes the award. RAP 18.9 authorizes an award of compensatory damages against a party who files a frivolous appeal. *See e.g., Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, *review denied*, 138 Wn.2d 1022 (1999). An appeal is frivolous if there are "'no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility' of success." *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (quoting *Millers Cas. Ins. Co. of Texas v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)).

Here, Curt presented no debatable point of law, his appeal lacks merit, and he had no reasonable chance for reversal. This appeal is frivolous and we hold that Carolyn is entitled to attorney fees and costs.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

I concur:

Hunt, J.

Houghton, P.J., (dissenting) — I concur in the majority's decision on the merits. But because I disagree that Curt Read's arguments are totally devoid of merit, I dissent from the majority's award of attorney fees for a frivolous appeal.

_____
Houghton, P.J.